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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

FIRST LIEUTENANT ANDREW HOLMES et al., Plaintiff and Respondent, v. CALIFORNIA NATIONAL GUARD et al., Defendants and Appellants.	A083451 (San Francisco County Super. Ct. No. 987009)
FIRST LIEUTENANT ANDREW HOLMES et al., Plaintiff and Appellant, v. CALIFORNIA NATIONAL GUARD et al., Defendants and Respondents.	A085180

These consolidated appeals arise from a potential conflict between the equal protection and free speech guarantees of the California Constitution and the constraints imposed by preemptive federal law with respect to the policy based on sexual orientation known as "Don't Ask, Don't Tell" (the Policy), as applied to individuals on or eligible for state active duty in the California National Guard. The trial court below declared California Army National Guard Regulation No. 600-1, paragraph 6(d) (hereinafter the Regulation) facially unconstitutional under the California Constitution insofar as it applies the Policy to individuals on state active duty employment in the California

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of the part entitled "Attorney Fees."

National Guard, or bars them from obtaining such state active duty employment if they have been discharged, separated or released from federal service under the Policy. The California National Guard, the State of California, Major General Tandy K. Bozeman and California Governor Gray Davis (collectively defendants) appeal from the judgment entered in favor of First Lieutenant Andrew Holmes (plaintiff), individually and on behalf of a class of persons similarly situated. Plaintiff in turn has appealed from the trial court's denial of his motion for attorney fees.

Contrary to the position of defendants, we hold that plaintiff does in fact have standing to challenge the constitutionality of the subject Regulation. Contrary to plaintiff, however, we agree with the defendants that the trial court's rulings potentially conflict with preemptive federal law upholding the constitutionality of the Policy under the United States Constitution with respect to individuals serving in active duty positions in the National Guard for which federal recognition is required. In order to avoid possible encroachment on areas specifically preempted by federal law, we therefore remand the cause to the trial court with orders to modify its declaratory judgment so as to clearly limit the scope of its coverage to individuals seeking state active duty employment in positions *not* requiring federal recognition. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff enlisted in the California National Guard in 1986. He received a California state officer's commission on May 21, 1988, at which point he incurred an eight-year period of obligated state service. On March 28, 1990, he was sworn in and received a commission as an officer of the California National Guard. He thereafter received temporary federal recognition and was sworn in as an officer of the United States Army National Guard pursuant to 32 of the United States Code section 308

(hereafter U.S.C.).[1] As a National Guard officer in a federally recognized unit, plaintiff was required by 32 U.S.C. section 502(a) to assemble for drill and instruction 48 times each year, and participate in training at encampments, maneuvers, outdoor target practice and other exercises at least 15 days each year. As a member of a federally recognized United States Army National Guard unit, he received a federal paycheck and was subject to being called into the service of the United States.[2]

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[1] 32 U.S.C. section 308 provides in pertinent part: "(a) The Secretary of the Army may authorize the extension of temporary Federal recognition as an officer of the Army National Guard to any person who has passed the examination prescribed in section 307(b) of this title, pending his appointment as a reserve officer of the Army. . . . Temporary recognition so extended may be withdrawn at any time. If not sooner withdrawn or replaced by permanent recognition upon appointment as a reserve officer in the same grade, it terminates six months after its effective date. [¶] (b) To be eligible for temporary Federal recognition under subsection (a), a person must take an oath that during the period of temporary recognition he will perform his Federal duties as if he had been appointed as a reserve officer of the Army . . . ."

The term "federal recognition" is important to this case. It is defined in title 32 of the Code of Federal Regulations, applicable to the United States National Guard, as follows: "Federal recognition means acknowledgment by the Federal Government that a person appointed to an authorized grade and position vacancy in the National Guard meets the prescribed Federal standards for such grade and position." (32 U.S.C. Appen. § 1101.3(c)(1).) "Federal recognition is the acknowledgment by the Federal Government that an officer [of the state militia] appointed, promoted, or transferred to an authorized grade or position vacancy in the [United States] Army National Guard meets the prescribed laws and regulation governing the action. . . . The loss of federal recognition means that the officer no longer participates in federally-paid duty status, which includes activities such as drills, annual training, or service schools at any cost to the federal government, nor may he be called into active federal service." (*Frey v. State of Cal.* (9th Cir. 1993) 982 F.2d 399, 400, fn. 3 (*Frey*); see also *Holmes v. California Army National Guard* (9th Cir. 1997) 124 F.3d 1126, 1131, fn. 7 ["Federal recognition is the acknowledgement that an officer of a state national guard unit may become an officer of the United States Army National Guard and meets the requirements for holding such position"].)

[2] The chronological record of plaintiff's National Guard service at first may appear somewhat confusing. Plaintiff's own declaration states that he was sworn in as an officer of the California Army National Guard in May 1988, and "thereafter" as an officer in the United States Army National Guard. According to the defendants, plaintiff was sworn in

During the course of his service, plaintiff earned many honors, including promotion to first lieutenant and combat military police platoon leader. He received the Army Achievement Medal, the Army Reserve Components Achievement Medal and the National Defense Service Ribbon for superior performance while deployed to Germany in support of Operation Desert Shield and Operation Desert Storm. His California National Guard performance rating for the years 1993 to 1994 stated that plaintiff "is a dedicated officer who supports the commander in every respect," "is loyal to his troops in every respect," and "has the potential to become a fine staff officer." In addition, the performance review stated that plaintiff's "strong leadership style was exemplified by the outstanding performance of his platoon during annual training," which "was a shining example of cohesion."

Beginning in December 1991, plaintiff served in full-time active duty status commanding a California National Guard task force unit engaged in counternarcotics efforts requiring federal recognition. According to plaintiff's declaration, at that time he was receiving "pressure" from his commanding officer "to communicate to members of my unit that I was not homosexual." On or about June 3, 1993, plaintiff voluntarily sent a written memorandum to his commanding officer at the California National Guard, in which he stated: "[A]s a matter of conscience, honesty and pride, I am compelled to inform you that I am gay." Based on this memorandum, the commanding officer initiated a request to withdraw plaintiff's federal recognition as an officer in the United States Army National Guard.

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as an officer in a federally recognized unit of the California National Guard in March 1990, and thereafter received temporary federal recognition as an officer in the Army National Guard of the United States. The explanation for this apparent confusion is the distinction between the California National Guard and the United States Army National Guard. Officers in the federally recognized National Guard have *two* commissions: one from the state, and the other as a Reserve Officer in the United States Army. Thus, plaintiff apparently received his *state* commission in May 1988, and his federal commission in March 1990.

On June 15, 1993, plaintiff received a memorandum informing him that his commanding officer was initiating a request to withdraw plaintiff's federal recognition because of his written statement acknowledging his homosexuality. On May 21, 1994, in accordance with the Policy, a federal recognition withdrawal board (the Board) was convened by the Sixth United States Army Commander, and commenced proceedings to determine if plaintiff's federal recognition should be withdrawn based on his June 3, 1993, memorandum.[3] Based on plaintiff's written acknowledgement of homosexuality,

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[3] The "Don't Ask, Don't Tell" Policy refers to the policy of the United States military, adopted in 1993, requiring the separation from federal military service of self-acknowledged homosexuals. As codified at 10 U.S.C. section 654, the Policy provides in pertinent part as follows: "(b) Policy.—A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

"(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—

"(A) such conduct is a departure from the member's usual and customary behavior;

"(B) such conduct, under all the circumstances, is unlikely to recur;

"(C) such conduct was not accomplished by use of force, coercion, or intimidation;

"(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

"(E) the member does not have a propensity or intent to engage in homosexual acts.

"(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

"(3) That the member has married or attempted to marry a person known to be of the same biological sex. [¶] . . .

"(f) Definitions.—In this section: [¶] . . .

"(3) The term 'homosexual act' means—

"(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

the Board found there was a rebuttable presumption plaintiff had engaged in homosexual conduct, which he had failed to rebut; and recommended that his federal recognition be withdrawn pursuant to 10 U.S.C. section 654, 32 U.S.C. section 323 and 32 U.S.C. Appendix section 1101.3(c). The Board's recommendation that plaintiff's federal recognition be withdrawn was approved by the Sixth United States Army Commander and the federal National Guard Bureau. By order of the Governor of California dated October 21, 1994, and as mandated by 32 U.S.C. section 324(a)(2), the California National Guard honorably discharged plaintiff from his federally recognized position, effective September 12, 1994.[4]

On January 3, 1995, plaintiff received notification from the National Guard Bureau of the termination of his employment with the United States Army National Guard of California, based on the withdrawal of his federal recognition. According to the defendants, after the withdrawal of his federal recognition plaintiff reverted to his former reserve status and remained a state commissioned officer of the California State Military Reserve, pursuant to California Military and Veterans Code section 213, for the unexpired duration of the eight-year period of his obligated service—that is, until May 21, 1996. On the other hand, according to plaintiff's declaration, after notification of his

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"(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)." (10 U.S.C. § 654(b), (f).)

4 In pertinent part, 32 U.S.C. section 324 provides: "(a) An officer of the National Guard shall be discharged when—

"(1) he becomes 64 years of age; or

"(2) his Federal recognition is withdrawn."

As used in this provision, the term "National Guard" is specifically defined as "that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive," that is "organized, armed, and equipped wholly or partly at Federal expense," and "federally recognized." (32 U.S.C. § 101(3), (4)(C) & (D).)

Thus, according to its own terms, this statute applies only to "that part" of a state's organized militia, i.e., National Guard, that satisfies a number of specifically *federal* requirements, including federal recognition.

honorable discharge he never received any further pay or communications of any kind from the California National Guard, was never informed that he retained his commission in the California National Guard, and was never told that he was eligible for any form of state active duty employment not requiring federal recognition.

In February 1995, plaintiff initiated the underlying litigation in federal district court against the defendants as well as the United States Army National Guard, the Secretary of Defense and the United States. The original action challenged plaintiff's discharge from the California National Guard and the United States Army National Guard under the Policy, and sought damages as well as injunctive and declaratory relief based on the United States Constitution and California state law. The District Court granted partial summary adjudication in favor of plaintiff on his federal equal protection and free speech claims against all defendants, and dismissed his remaining federal claims. (*Holmes v. California Army Nat. Guard* (N.D.Cal. 1996) 920 F.Supp. 1510, 1536-1537.)

On September 5, 1997, the Ninth Circuit Court of Appeals reversed the judgment, holding the Policy constitutional on its face and as applied to plaintiff's loss of federal recognition. (*Holmes v. California Army National Guard, supra*, 124 F.3d at pp. 1131-1137.) The federal appellate court also made the factual determination that after his October 1994 discharge from the United States Army National Guard and the January 1995 notification that he was being discharged from "the part of [the California National Guard] subject to being called into federal service, based solely on his loss of federal recognition," plaintiff retained and "currently holds an officer position in the state and United States reserve groups that does not require federal recognition and is not subject to being called into federal service." The Ninth Circuit did not reach the issue of whether the California state defendants could be held liable under California law for their application of the Policy against plaintiff. (*Id.* at pp. 1131, 1136.) Plaintiff's petition for review to the United States Supreme Court was denied. (*Holmes v. California Army National Guard* (1999) 525 U.S. 1067.)

Plaintiff filed the instant action in the Superior Court of San Francisco County on May 27, 1997. The complaint, which was brought on behalf of plaintiff and "all persons similarly situated,"[5] alleged seven causes of action, entirely under California state law: (1) violation of equal protection under the California Constitution; (2) violation of freedom of speech under the California Constitution; (3) violation of the right to privacy under the California Constitution; (4) violation of the Labor Code; (5) violation of the Government Code; (6) violation of the State of California Executive Order No. B-54-79 barring discrimination on the basis of sexual orientation in agencies of the state government under the jurisdiction of the Governor; and (7) wrongful discharge in violation of public policy. The defendants demurred on the grounds that, among other things, (a) plaintiff had not alleged that he was ever discharged from his nonfederally recognized state commission in the California controlled State Military Reserve; and (b) the defendants' actions were preempted by the United States Constitution and federal law. The trial court overruled the defendants' demurrer.

In February 1998, after answering the complaint, the defendants filed a motion for summary judgment or summary adjudication, again arguing as before in connection with the demurrer that plaintiff had failed to allege and could not prove that he was discharged from his state commission, and that his claims were preempted by federal law. On May 19, 1998, the trial court denied the defendants' motion for summary judgment, finding that "[t]riable issues of fact exist regarding disparate treatment" of plaintiff, and as a matter of law "[f]ederal law does not pre-empt Plaintiff's state law claims." In reference

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[5] Paragraph 40 of the complaint alleged as follows: "Lt. Holmes brings this action on his own behalf, and on behalf of all persons similarly situated. The class Lt. Holmes represents consists of all past members of the California National Guard discharged after the effective date of the Policy on the basis of their sexual orientation or based on their loss of federal recognition premised on their sexual orientation. The class also includes all present homosexual and bisexual members of the California National Guard, all of whom risk discharge if their sexual orientation becomes known and whose conduct is subject to differential restrictions as a result of the California National Guard's application of the Policy."

to evidence indicating the existence of triable issues, the trial court specifically cited the subject Regulation, upon which it would subsequently base its summary judgment in plaintiff's favor.[6]

Meanwhile, on May 1, 1998, plaintiff filed a motion for summary adjudication on his first and second causes of action, arguing that the Regulation was facially unconstitutional and in excess of the defendants' authority because by barring individuals from serving in state active duty who have been discharged from federal service "for cause," it effectively prohibited acknowledged homosexuals from obtaining state active duty positions in violation of the equal protection and free speech guarantees of the California Constitution. In opposition, the defendants argued that plaintiff lacked standing to attack the Regulation because (a) the only discharge he ever experienced was at the completion of his tour of temporary active duty special work on July 3, 1993, before his loss of federal recognition; (b) there was no evidence he had ever been released or discharged from federal or state active service "for cause"; and (c) "a withdrawal of federal recognition does not amount to a discharge from federal service."

After extensive argument at the hearing on plaintiff's motion, the trial court found no triable issues of material fact with regard to the following facts: (1) a withdrawal of federal recognition based on an individual's acknowledgement of his or her homosexuality results in a "for cause" discharge from federal service; (2) plaintiff's federal recognition was withdrawn based on his statement of his sexual orientation; (3) plaintiff's federal recognition was withdrawn "for cause"; (4) certain officers lacking federal recognition may continue to serve on state active duty; (5) the Regulation prohibits individuals released from federal service "for cause" from obtaining state active duty employment; and (6) no officer whose federal recognition has been withdrawn "for

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6 Regulation No. 600-1, paragraph 6(d) states in pertinent part as follows: "All State Active Duty personnel are required to meet military medical standards and physical fitness standards appropriate for their branch of service, . . . meet military educational

cause" has ever subsequently served on state active duty. On this basis, the trial court granted plaintiff's motion for summary adjudication, finding as a matter of law that (1) the Regulation was "facially unconstitutional" because it prohibited homosexuals discharged from federal service under the Policy from obtaining state active duty employment and thereby (a) discriminated against homosexuals in violation of the equal protection clause of the California Constitution and (b) impermissibly burdened the exercise of homosexuals' rights to freedom of speech under the California Constitution; and (2) the Regulation was inconsistent with Military and Veterans Code section 101.[7]

Accordingly, the trial court issued a judgment that (1) declared the Regulation "facially unconstitutional and invalid to the extent that it prohibits individuals who have been discharged or released from federal service under the 'Don't Ask, Don't Tell' policy based on sexual orientation from obtaining State Active Duty employment," in violation of the equal protection and free speech guarantees of the California Constitution; (2) declared the Regulation invalid as "adopted in excess of [the California National Guard's] statutory authority"; (3) enjoined the defendants from enforcing the Regulation "in a manner that prohibits individuals who have been discharged or released from federal service under the 'Don't Ask, Don't Tell' policy from obtaining State Active Duty employment"; (4) "enjoined and prohibited" the defendants "from regarding, considering, or treating the separation from federal service of, or withdrawal of federal recognition from, individuals who have been separated or released from federal service under the

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standards for their grade, must not have been convicted of a felony, and must not have been released from federal or state active duty for cause."

[7] Military and Veterans Code section 101 provides: "All acts of the Congress of the United States relating to the control, administration, and government of the Army of the United States and the United States Air Force and relating to the control, administration, and government of the United States Navy, and all rules and regulations adopted by the United States for the government of the National Guard and Naval Reserve or Naval Militia, *so far as the same are not inconsistent with the rights reserved to this State and guaranteed under the Constitution of this State*, constitute the rules and regulations for the government of the militia." (Italics added.)

[Policy] as 'for cause' "; and (5) "further ordered [the defendants] to regard, consider, and treat the separation from federal service of, or withdrawal of federal recognition from, individuals who have been separated or released from federal service under the [Policy] as 'administrative,' thereby not affecting the individual's right to serve in state active service." In addition, the trial court granted plaintiff's motion for class certification and dismissed the remaining causes of action of plaintiff's complaint without prejudice.[8] The defendants' appeal in No. A083451 timely followed on July 2, 1998.

On August 13, 1998, plaintiff moved for an award of attorney fees and costs pursuant to Code of Civil Procedure section 1021.5 (hereafter section 1021.5) in an amount of approximately $405,156; or, in the alternative, an order declaring him the prevailing party under Code of Civil Procedure section 1032 for purposes of taxable costs. At the hearing on plaintiff's motion, the trial court expressed skepticism both about the amount of plaintiff's attorney fee request, and on the question whether there was a sufficiently large class of persons benefited by the judgment to justify an award of attorney fees under section 1021.5. After taking the matter under submission, the trial court entered a written order denying the motion on October 21, 1998. Instead, the trial court granted plaintiff's alternative motion for costs, and awarded plaintiff costs in the

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[8] The trial court certified the following class: "All past members of the California National Guard discharged on the basis of their sexual orientation or based on their loss of federal recognition premised on their sexual orientation, as well as all present homosexual and bisexual members of the California National Guard, all of whom risk discharge if their sexual orientation becomes known." Upon plaintiff's motion, the trial court dispensed with class notification on the ground the subject class was seeking solely equitable relief, and was thus a type of class for which class notification was unnecessary. (Fed. Rules Civ.Proc., rule 23(b)(2); *Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1608-1609; *Frazier v. City of Richmond* (1986) 184 Cal.App.3d 1491, 1501.)

On September 18, 1998, after full briefing by the parties, we denied the defendants' petition for writ of mandate or prohibition seeking to overturn the trial court's order certifying the plaintiff class. On their present appeal in No. A083451, the defendants have not raised any challenge to the propriety of the class certification.

amount of $41,219. Plaintiff's separate appeal of this order timely followed in No. A085180.

BACKGROUND AND NATURE OF THE NATIONAL GUARD

Because the complex relationship between the California National Guard and the United States National Guard is of central importance to this appeal, we first examine the background, history, and nature of the National Guard as an institution of federal and state government. Both traditionally and historically, the term "militia" is understood to refer to a part-time, nonprofessional fighting force. " 'Lexicographers and others define militia, and so the common understanding is, to be "a body of armed citizens trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies, in time of peace." . . . The men [and women] comprising [the active militia of a state] come from the body of the militia, and when not engaged at stated periods in drilling and other exercises, they return to their usual avocations, as is usual with militia, and are subject to call when the public exigencies demand it.' [Citation.]" (*Perpich v. Department of Defense* (1990) 496 U.S. 334, 348 (*Perpich*).)

Clauses 15 and 16 of Article I, section 8 of the United States Constitution, known as "the Militia Clauses," grant to Congress the powers "[t]o provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;" and "[t]o provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." (U.S. Const., art. I, § 8, cls. 15, 16.) In accordance with this authorizing language in the federal Constitution, during the first decade of the 20th century Congress passed legislation creating an "organized militia" to be known as the National Guard of the several states. In response to concerns the National Guard could not be employed outside the borders of the United States, Congress subsequently enacted legislation providing for greater federal control and funding of the National Guard, and creating a "dual enlistment" system under which

an individual enlisting in a state National Guard unit simultaneously enlists in the National Guard of the United States. (*Perpich, supra*, 496 U.S. at pp. 340-345.)

Thus, as presently constituted, the National Guard consists of " 'two overlapping, but legally distinct organizations . . .' "—the federal, or United States National Guard, and the separate National Guards of the various individual states. (*Perpich, supra*, 496 U.S. at pp. 338, 345.) In their capacity as members of the National Guard of the United States, individual members of the National Guard are part of the enlisted reserve corps of the federal armed forces of the United States. However, unless and until ordered to active duty in the Army, such individuals retain their status as members of separate State National Guard units. If and when ordered into active duty in the federal military service, members of the National Guard thereby lose their status in their respective State National Guards for the duration of their period of active federal military service. During their time of *federal* active duty, their state affiliation is suspended in favor of an entirely federal affiliation, and they are subject to all applicable laws and regulations of the United States military. Upon being relieved from federal active duty, such individuals then revert to their *State* National Guard status and duty. (10 U.S.C. §§ 101(d), 12107, 12201(a); 32 U.S.C. §§ 101(5) and (12), 102, 325(a); *Perpich, supra*, 496 U.S. at pp. 345-349; *Gilliam v. Miller* (9th Cir. 1992) 973 F.2d 760, 763-764; *United States v. Dern* (D.C. Cir. 1934) 74 F.2d 485, 487 (*Dern*).)[9]

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9 "[I]t is clear that Congress, in carrying out its constitutional powers, had almost from the beginning provided by law for organizing, arming, and disciplining the militia, and that the process has been one of gradual enlargement, the United States assuming constantly increasing responsibility and exercising more and more control in organization and discipline, but it is clear notwithstanding all of this, that *except when employed in the service of the United States, officers of the National Guard continue to be officers of the state and not officers of the United States or of the Military Establishment of the United States*. And this limitation of power was always recognized by the Congress. *The United States has not appointed, and constitutionally cannot appoint or remove (except after being called into federal service), officers of the National Guard, for there must be a State National Guard before there can be a National Guard of the United States, and the primary duty of appointing the officers is one of the powers reserved to the states*. But

Notwithstanding periods of federal service, then, members of a state National Guard like that of California continue to satisfy the traditional understanding of a militia as a body of nonprofessional, part-time citizen soldiers " ' ". . . who may be called out in certain cases, but may not be kept on service like standing armies, in time of peace.". . . ' " (*Perpich, supra,* 496 U.S. at p. 348.) "In a sense, all of them now must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time. When the state militia hat is being worn, the 'drilling and other exercises' . . . are performed pursuant to 'the Authority of training the Militia according to the discipline prescribed by Congress,' but when that hat is replaced by the federal hat, the second Militia Clause is no longer applicable." (*Ibid.*) As long as individual members of the state National Guard are not in federal active duty, however, they retain their *state* affiliation, status and duties. (*Id.* at pp. 345-346, 348; *Frey, supra,* 982 F.2d at pp. 403-404; *Gilliam v. Miller, supra,* 973 F.2d at pp. 763-764; *Dern, supra,* 74 F.2d at p. 487.)**10**

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while this is true, it is also true that Congress has authority to determine the extent of the aid, support, and assistance which shall be given the National Guard of the various states and the terms upon which it shall be granted. [Citation.] This flows from the power to organize, arm, and discipline. But, *except when employed in the service of the United States, the whole government of the militia is within the province of the state, and this follows because of the precise limitations of the constitutional grant*. The United States may organize, may arm, and may discipline, but all of this is in contemplation of, and preparation for, the time when the militia may be called into the national service. Until that event, the government of the militia is committed to the states. [Citation.] . . . *Nor is there any more doubt that Congress has the power to withhold federal recognition from all or any part of the militia in its discretion, or to impose the conditions of its acceptance*. This power is a necessary attribute of the constitutional grant." (*Dern, supra,* 74 F.2d at p. 487, italics added.)

10 Congress has provided by statute that in addition to its State National Guard, an individual State may provide and maintain at its own expense a separate militia of its own, as a "defense force" for use within its own territorial limits and jurisdiction that may not be called, ordered or drafted into the Armed Forces of the United States. (32 U.S.C. § 109(c); *Perpich, supra,* 496 U.S. at pp. 351-352.) Thus, Congress has specifically granted the States authorization for the maintenance of purely state active duty positions that do not require federal recognition, and which may not be "federalized."

The term "federal recognition" constitutes an "acknowledgement" by the federal government that a member of the state National Guard meets all the requirements for federal service and therefore qualifies and is eligible for a position in the United States National Guard. (32 U.S.C. Appen. § 1101.3(c)(1); *Holmes v. California Army National Guard, supra,* 124 F.3d at p. 1131, fn. 7.) It thus describes the condition or status of *eligibility* for service in federal active duty as a member of the United States National Guard. An officer or member of a State National Guard who has lost federal recognition can no longer be called into active federal service. Notwithstanding loss of federal recognition, however, such an individual may remain on state active duty and retain an officer position in State National Guard and United States reserve groups *not* requiring federal recognition and *not* subject to being called into federal service. (32 U.S.C. § 323(a); *Holmes v. California Army National Guard, supra,* 124 F.3d at p. 1131; *Frey, supra,* 982 F.2d at pp. 400-404 & fn. 3; *Dern, supra,* 74 F.2d at p. 487; Mil. & Vet. Code, §§ 120, 222.)[11]

At the outset, before addressing the issues raised on these consolidated cross-appeals, we first note what the defendants do *not* contend on their appeal. First and foremost, they do not contest the key facts that under the Policy, a person's homosexual

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This statutorily authorized state defense force is separate and distinct from the state National Guard at issue in this case. In California, the separate state militia is called the State Military Reserve (SMR). Like the California National Guard, the SMR is part of the active state militia, but is "additional to and distinct from the National Guard." (Mil. & Vet. Code, §§ 120, 550 et seq.)

11 Military and Veterans Code section 222 explicitly provides that the California National Guard may include persons who lack federal recognition. In pertinent part, the California statute provides as follows: "Persons to be commissioned in the National Guard shall be selected from those eligible for federal recognition . . . *and* from former commissioned officers of the United States Army, United States Air Force, United States Navy, or any reserve component thereof, who were honorably separated therefrom *but are no longer eligible for federal recognition*." (Italics added.)

orientation is a basis for withdrawal of federal recognition and discharge from federal active service "for cause"; and that the subject Regulation bars from state active duty all individuals who have been released from federal active duty "for cause." From this concession, it necessarily follows that insofar as it incorporates the federal Policy, the Regulation excludes a class of persons from state active duty service on the basis of their sexual orientation. Similarly, the defendants *do not contest* the trial court's determinations that: (a) to the extent the Regulation bars homosexuals from state active duty service in positions not requiring federal recognition, the Regulation thereby discriminates against such individuals in violation of the equal protection guarantees of the California Constitution; and (b) by prohibiting an individual from serving in state active duty based on the individual's statement acknowledging his or her homosexuality, the Regulation is in violation of the free speech guarantees of the California Constitution. Finally, since our denial of their writ petition seeking to overturn the trial court's class certification order, the defendants have not raised any challenge to the propriety of the trial court's certification of the plaintiff class in this appeal.

ADEQUACY OF PLAINTIFF'S PLEADINGS

In its judgment, the trial court declared the Regulation unconstitutional to the extent it bars individuals from obtaining state active duty employment if they have been discharged or released from federal service based on sexual orientation, and enjoined the California National Guard from prohibiting such individuals from obtaining state active duty employment. The defendants' initial contention is that the trial court erred in granting summary judgment on this basis because the issue of the Regulation was not raised by plaintiff in his original pleadings. To the extent this contention of the defendants has not been waived, it is without merit.

Until this appeal, the defendants never argued that plaintiff's complaint failed to plead any causes of action asserting the unconstitutionality of the Regulation. In opposing plaintiff's motion for summary adjudication, the defendants argued only that plaintiff lacked standing to complain about the Regulation because he had assertedly not

been "released" from either federal or state active duty "for cause." Not until now have the defendants contended the trial court erred by basing its summary judgment on an issue allegedly not raised by the plaintiff in his pleadings.

By failing to raise this issue before the trial court, the defendants have waived their present argument. The defendants cannot rely upon a purported pleading defect that they had ample opportunity to raise below and which could easily have been cured. (*Wood v. Riverside General Hospital* (1994) 25 Cal.App.4th 1113, 1120 [summary judgment for defendant affirmed based on issue not raised in complaint, where "no purpose would be served in returning the case to the court below only to have the pleadings amended and, thereafter to have a renewed motion for summary judgment granted"]; *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 385 [plaintiffs' failure to challenge the sufficiency of pleadings in trial court treated as waiver of issue on appeal, where if pleadings had been challenged in trial court "it is likely that [defendants] would have been allowed to amend their [pleadings]"]; *Roybal v. University Ford* (1989) 207 Cal.App.3d 1080, 1087-1088 & fn. 6 [summary judgment for defendant affirmed on basis of affirmative defense not raised in answer, where plaintiff waived challenge to sufficiency of answer by failing to raise the issue in opposition to summary judgment].)

In any event, the record shows that plaintiff did adequately raise the issue of the Regulation's constitutionality in his pleadings. The first and second causes of action of plaintiff's complaint alleged that the defendants had violated plaintiff's constitutional rights to equal protection and freedom of speech by choosing to apply the federal Policy to state employees of the California National Guard. Subsequently, the nature of the Regulation and its connection to plaintiff's discharge from the California National Guard was explored in discovery. The existence of the Regulation was a principal basis for the trial court's denial of the defendants' own earlier motion for summary judgment.

We are required to disregard any error or defect in the pleadings or proceedings which did not affect the substantial rights of the parties. (Code Civ. Proc., § 475.) On this record, the defendants were on notice of the nature of plaintiff's claims and their

connection with the Regulation. Certainly, once the trial court had—at least in part—based its denial of the defendants' motion for summary judgment on the existence of the Regulation and its impact on plaintiff's employment in the National Guard, it was hardly a reach for plaintiff to argue that the Regulation itself was unconstitutional insofar as it had been used to apply the Policy to his state active duty employment. Any arguable defect in plaintiff's pleadings with regard to the Regulation was simply not prejudicial to the substantial rights of the defendants.

PLAINTIFF'S STANDING TO CHALLENGE THE REGULATION

As noted, the one argument raised by the defendants in opposition to plaintiff's motion for summary judgment was that of standing. On this appeal defendants again contend plaintiff lacked standing to challenge the Regulation because his active-duty orders actually expired before his ultimate separation from the California National Guard; and therefore the Regulation technically did not apply to him because he was assertedly never released from federal or state *active duty* "for cause." As did the trial court, we reject appellant's argument as contrary to the record.[12]

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[12] We note that in opposing plaintiff's motion for summary adjudication, the defendants made objections to *only five* of the thirty-two factual statements contained in plaintiff's "separate statement of undisputed material facts in support" of his motion. Among the many statements of material fact which the defendants did *not* contest are the following: "On June 3, 1993, Lt. Holmes sent a memorandum to his commanding officer that stated, '[A]s a matter of conscience, honesty and pride, I am compelled to inform you that I am gay" (No. 3); "Shortly before writing the June 3, 1993 memorandum, Lt. Holmes' superior officers had pressured him to tell his platoon that he was not gay" (No. 4); "The California National Guard, at the request of Lt. Holmes' commander, initiated proceeding[s] to withdraw Lt. Holmes' federal recognition as a result of Lt. Holmes' June 3, 1993 memorandum" (No. 5); "Federal recognition may be lost for malfeasance, dereliction of duty, age, length of service in the Guard, and having a homosexual sexual orientation" (No. 15); "Withdrawal of an officer's federal recognition 'for cause' is equivalent to withdrawal of federal recognition based on malfeasance, immoral conduct, or dereliction of duty under U.S. Army Regulation 135-175, paragraphs 2-11 and 2-12" (No. 16); "Withdrawal of an officer's federal recognition 'administratively' occurs when an individual has completed 28 years of service or has retired" (No. 17); "Withdrawal of federal recognition based on an officer's statement of his homosexuality is 'for cause,'

As a general principle, standing to invoke the judicial process requires an actual justiciable controversy as to which the complainant has a real interest in the ultimate adjudication because he or she has either suffered or is about to suffer an injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented to the adjudicator. (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 169-172; *Municipal Court v. Superior Court* (1988) 202 Cal.App.3d 957, 960-964; *California Water & Telephone Co. v. Los Angeles* (1967) 253 Cal.App.2d 16, 22; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, §§ 73-74, pp. 132-135.) To have standing, a party must be beneficially interested in the controversy; that is, he or she must have "some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." (*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796.) The party must be able to demonstrate that he or she has some such beneficial interest that is concrete and actual, and not conjectural or hypothetical. A complaining party's demonstration that the subject of a particular challenge has the effect of infringing some constitutional or statutory right may qualify as a legitimate claim of beneficial interest

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warranting a general discharge under honorable conditions" (No. 18); "Lt. Holmes' federal recognition was withdrawn 'for cause' " (No. 19); "No officer whose federal recognition has been withdrawn 'for cause' has ever subsequently served on State Active Duty, in a paid or volunteer status" (No. 20); "California Army National Guard regulation 600-1 requires that, to be eligible for service on State Active Duty, an individual must not have been released from federal or state active duty for cause" (No. 22); "No one has ever served on State Active Duty after stating that he or she has a homosexual orientation" (No. 24); "None of the officers currently serving on State Active Duty has ever stated that he or she is homosexual" (No. 25); and "The California National Guard never informed Lt. Holmes that he was transferred to the State Military Reserve" (No. 26).

Significantly, these *undisputed* material facts correspond closely to the trial court's own statement of "issues as to which no triable issues of material fact exist," on the basis of which it granted plaintiff's motion for summary adjudication.

sufficient to confer standing on that party. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361-363.)

In this case, defendants argue the term "federal active duty" is limited by federal statute to "full-time duty in the active military service of the United States," and "does not include full-time National Guard duty," i.e., the kind of active duty service performed by plaintiff. (10 U.S.C. § 101(d)(1); 32 U.S.C. § 101(12).) Thus, because he was obviously serving in the California National Guard, defendants argue that plaintiff's service did not fit within the federal statutory definition of federal military "active duty" as that term is used in the Regulation at issue.

Second, the defendants contend the temporary self-executing orders under which plaintiff was serving at the time his sexual orientation became known and the discharge proceedings were commenced against him under the Policy expired of their own accord on July 3, 1993. This was well before the National Guard had actually completed its discharge proceedings, at which point plaintiff's federal recognition was withdrawn and the California National Guard honorably discharged him from his federally recognized position, effective September 12, 1994. Thus, defendants contend, plaintiff's temporary tour of federal active duty simply came to the end of its predetermined term, rather than being terminated for cause under the Policy or the Regulation.

Finally, the defendants maintain plaintiff never applied for and was never placed on "state active duty." Because the specific federal service plaintiff was performing on the California National Guard counternarcotics task force was governed by United States Army regulations and was not considered state active duty, defendants insist plaintiff could not have been "released . . . for cause" from *state* "active duty."

In their effort effectively to read plaintiff out of the ambit of the subject Regulation, the defendants offer a strained and hypertechnical reading thereof, using unrealistically narrow definitions of key terms as a result of which plaintiff's National Guard service would qualify as *neither* federal *nor* state "active duty." Defendants' position does not bear close scrutiny. In the first place, the federal statutory definition of

"active duty" cited by the defendants from the United States Code is not referenced by the Regulation itself, or by any other California statutes or regulations in connection therewith. The defendants have not provided any evidence that the state drafters of the Regulation intended the definitions of "active duty" set out in 10 U.S.C. section 101(d)(1) and 32 U.S.C. section 101(12) to apply to the Regulation or limit its scope. Indeed, 32 U.S.C. section 101 specifically provides that various definitions set out in title 32 *only* "apply in this title" of the United States Code.

Moreover, the "full-time National Guard duty" *excluded* from the definition of "active duty" in the federal statutes cited by defendants is in turn itself defined by the same federal statutes as "duty, other than inactive duty, performed by a member of the Army National Guard of the United States . . . in the member's status as a member of the National Guard *of a State* . . . for which the member is entitled to pay from the United States . . . ." (10 U.S.C. § 101(d)(5), italics added; 32 U.S.C. § 101(19).) In other words, the full-time National Guard duty excluded from the definition of *federal* active duty is *state* active duty in the National Guard. This is fully consistent with the fact that until they are called into active federal service, the various state National Guards are governed not by the federal government, but by the individual states. (U.S. Const., art. I, § 8, cls. 15, 16; *Perpich, supra,* 496 U.S. at pp. 338-349; *Frey, supra*, 982 F.2d at pp. 403-404; *Gilliam v. Miller, supra,* 973 F.2d at pp. 763-764; *Dern, supra*, 74 F.2d at p. 487.) There is nothing in the record suggesting the cited federal statutes narrow the definition of *state* active duty. The record is replete with admissions by National Guard personnel that plaintiff was serving on "active duty." Thus, assuming for the sake of argument that the cited federal statutes are controlling here, plaintiff's service in the counternarcotics task force would nevertheless qualify as *state* "active duty" funded by the federal government but authorized, organized, implemented and administered by the state. (32 U.S.C. § 112(a), (c); Mil. & Vet. Code, § 142.)

Perhaps the most serious problem with the defendants' strained, hypertechnical reading of the Regulation is that it conflicts with the way the Regulation is applied in

actual practice. The Regulation must be given "a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature." (*DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 18, overruled on other grounds in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 15.) On its face, the Regulation displays the manifest intent to preclude individuals released for cause from subsequently serving on state active duty. Under the defendants' artificial reading of the Regulation, however, only those individuals released "for cause" from active duty as very narrowly defined by the defendants would be excluded from future state active duty; individuals who were discharged or released from federal or state *reserve* duty on the basis of identical "for cause" grounds would, on the other hand, be perfectly welcome to serve in state active duty. Hypothetically, homosexuals released for cause from active United States Army duty would be categorically barred from future state active duty, at the same time persons released for cause from the United States Army Reserve would be welcome to apply for state active duty no matter what the reasons for their separation.

Nor is there merit to the defendants' reliance upon the chronology of plaintiff's self-executing discharge in July 1993 from his temporary active duty in the California National Guard counternarcotics task force, before the completion of the ongoing proceedings to withdraw his federal recognition. The fact that plaintiff's temporary tour of duty actually expired during the processing of the withdrawal of his federal recognition and before his ultimate discharge from his federally recognized position can not change or obscure the undisputed facts of this case. Based entirely on plaintiff's written acknowledgement of homosexuality, plaintiff's superiors in the United States Army California National Guard undertook proceedings to withdraw his federal recognition and ultimately did so, which directly resulted in both his October 1994 discharge for cause by the United States Army National Guard from his federally recognized position and his subsequent January 1995 discharge from that part of the California National Guard subject to being called into federal service. As the defendants either acknowledged or

failed to dispute below, the withdrawal of plaintiff's federal recognition and subsequent release from his National Guard position based on the Policy constituted a release from active duty *for cause* which, under the Regulation, made him *ineligible* for state active duty service.

On this record, we conclude plaintiff had standing to bring his challenge to the Regulation under the California Constitution. Certainly plaintiff demonstrated below that the Regulation could have the effect of infringing his rights under the California Constitution to equal protection, freedom of association, and freedom of expression. We therefore hold plaintiff asserted a legitimate beneficial interest sufficient to state a justiciable controversy and confer standing to challenge the constitutionality of the Regulation. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com., supra,* 21 Cal.4th at pp. 361-363.)

FEDERAL PREEMPTION

The defendants' principal substantive contention is that the trial court's judgment and injunctions—which bar enforcement of the Regulation in a manner that prohibits individuals discharged or released from federal service under the Policy from serving on state active duty—are themselves preempted by federal constitutional, statutory and regulatory law. Defendants contend that although "[c]ertain positions" within the California National Guard "are tied to positions in the National Guard of the United States," and "[s]ome state active duty positions require federal recognition" and are "subject to being activated for federal service," "[t]he trial court essentially held that an individual with no federal recognition can hold a state active duty position which requires federal recognition," and even "order[ed] the [California National Guard] to place individuals without federal recognition into state active duty positions that require federal recognition." Defendants urge that the trial court's judgment was clearly erroneous on grounds of the historic federal preemption of the entire field covering the organization, disciplining and governing of the militia, more commonly known as the National Guard.

While we disagree with some aspects of the defendants' characterization of the trial court's judgment and injunctions, we must agree that the trial court's ruling is open to possible misinterpretation in ways which could lead its injunctions to encroach on areas clearly preempted by federal law. In order to avoid such potentially serious pitfalls of misinterpretation, we therefore hold that the language and scope of the trial court's rulings must be explicitly limited to providing and securing equal access, without regard to sexual orientation, to employment and service in state active duty positions *not requiring federal recognition*.

At the outset, we reject plaintiff's assertion that the defendants have waived this contention because they failed to raise it in opposition to plaintiff's motion for summary adjudication and then allegedly "consented" to the form of the trial court's injunction. In fact, defendants unambiguously raised the issue of federal preemption at least twice in the trial court: first, by way of demurrer; and second, in their own motion for summary judgment. In their demurrer to plaintiff's complaint, defendants argued, as they do here, that any challenge to their actions in discharging plaintiff from his federally recognized position was preempted by the Militia Clauses and applicable federal statutes. In their motion for summary judgment, defendants again argued that their actions in discharging plaintiff were required by federal law, and that any claims regarding the application of federal recognition standards to National Guard service positions were preempted by federal constitutional and statutory law. These arguments were opposed by plaintiff, and expressly rejected by the trial court prior to the summary adjudication motion that is the subject of this appeal. On this record, the issue of preemption was squarely before the trial court, and has therefore not been waived.[13]

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[13] Almost incidentally, defendants also contend that the trial court's judgment should be reversed because "it directly interferes with military policy and decision-making," in alleged violation of the traditional deference of the courts "to the special function of the military in our constitutional structure and in the system of national defense." Unlike their preemption argument, appellants never raised or asserted this contention below. As plaintiff convincingly argues in his responding brief in appeal No. A083451, defendants'

The preemption doctrine derives from the Supremacy Clause of the United States Constitution, which declares in pertinent part that the Constitution and laws of the United States "shall be the supreme law of the land," binding on the judges of every state notwithstanding anything to the contrary in the constitutions or laws of the several states. (U.S. Const., art. VI, § 2.)[14] Since the decision in *McCulloch v. Maryland* (1819) 17 U.S. 316, 427, "it has been settled that state law that conflicts with federal law is 'without effect.' " (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516 (*Cipollone*).) Whether federal law preempts state law "fundamentally is a question of congressional intent." (*English v. General Elec. Co.* (1990) 496 U.S. 72, 79; see also *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 568; *Smiley v. Citibank* (1995) 11 Cal.4th 138, 147-148; *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1066.)

In addressing any question of preemption, we start with the presumption that the historic police powers of the States are not to be preempted or superseded by federal law unless there is a "clear and manifest purpose" on the part of Congress to do so. (*Cipollone, supra,* 505 U.S. at p. 516; *Smiley v. Citibank, supra*, 11 Cal.4th at p. 148.) Preemption is found in three circumstances. First, Congress can explicitly define the extent to which its specific enactments are intended to preempt state law. Second, in the absence of such explicit statutory language, state law is preempted where it regulates

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passing reference to this argument in their opening brief on appeal fails to demonstrate that the alleged principle is applicable to the facts of this case, and is in any event amply refuted by substantial appellate law declining to defer to the military on issues of unconstitutional discrimination or discharge. (See, *Emory v. Secretary of Navy* (D.C. Cir. 1987) 819 F.2d 291, 294; *Dillard v. Brown* (3d Cir. 1981) 652 F.2d 316, 319-322; *Dep't of Military and Vet. Affairs v. Bowen* (Alaska 1998) 953 P.2d 888, 895-896.) On the record before us, we consider defendants to have waived this particular argument.

14 United States Constitution, article VI, section 2 provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."

conduct or activities in a field that Congress clearly intended the federal government exclusively to occupy. Third, state law is preempted to the extent it actually conflicts with federal law. (*Cipollone, supra,* 505 U.S. at p. 516; *English v. General Electric Co., supra,* 496 U.S. at pp. 78-79; *Smiley v. Citibank, supra,* 11 Cal.4th at pp. 147-148.)

Here, defendants argue that under the Militia Clauses, Congress has plenary power over the National Guard. They rely on the provisions of the United States Constitution expressly vesting Congress *alone* with the powers "[t]o provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions," and "[t]o provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the Service of the United States." (U.S. Const., art. I, § 8, cls. 15, 16.) Defendants urge that despite the Militia Clauses' reservation to the states of some authority over militias, specifically with regard to the appointment of officers and actual training prior to active duty in federal service, even this authority is subject to limitations "*according to the discipline prescribed by Congress*." (*Ibid.*, italics added.) Based on this language of the federal constitution, the subsequent Congressional statutes establishing the National Guard, and the controlling judicial interpretation of those constitutional and statutory provisions, defendants argue Congress has assumed preemptive authority over the governance of the National Guard, at least when employed in the service of the United States. On this ground, defendants maintain they are *compelled* by federal law to apply the Policy to certain state active duty positions requiring federal recognition; and, as written, the trial court's judgment improperly infringes on this preemptive federal mandate.

The defendants' analysis of controlling federal law is largely accurate. (See generally, *Perpich, supra,* 496 U.S. at pp. 349-354.) It is true that individuals lacking federal recognition may serve in purely state active duty positions, consistent with the Militia Clauses' reservation to the states of power over the appointment of officers to state militias. (*Frey, supra,* 982 F.2d at pp. 400-404; *Gilliam v. Miller, supra,* 973 F.2d at pp. 763-764.) As defendants correctly point out, however, federal recognition is

required for any federal service, including that which may overlap with state service. Thus, although loss of federal recognition does not bar an individual from employment in a state active duty position, whenever federal recognition is still required a state cannot dispense with the Congressionally-imposed requirements for such status without encroaching on a field preempted by federal constitutional and statutory law. (*Perpich, supra,* 496 U.S. at pp. 349-354; *Frey, supra,* 982 F.2d at pp. 400, 403-404.) Defendants argue this is precisely what the trial court has done in this case, by entering an overbroad judgment that, as written, potentially imposes state nondiscrimination requirements on California National Guard service positions requiring federal recognition and, as such, governed by federal law.

We must disagree with defendants' assertions the trial court *specifically* ruled that "individuals without federal recognition can serve in state active duty positions which require federal recognition," and even "order[ed] the [California National Guard] to place individuals without federal recognition into state active duty positions that require federal recognition." On its face, the trial court's judgment declared the Regulation unconstitutional "to the extent" it had the effect of prohibiting individuals discharged or released from federal service based on the Policy from obtaining *state* active duty employment; and enjoined defendants from applying the Regulation or the Policy to bar such individuals from obtaining or serving on *state* active duty positions only. There is nothing in the record indicating the trial court *intended* its judgment to require the defendants to allow individuals lacking federal recognition to serve in state active duty positions requiring such federal recognition.

By the same token, however, the language of the trial court's judgment as it stands does not clearly *exclude* the interpretation asserted by defendants. Thus, as written, the trial court's judgment does not make any exception for positions coming within the definition of state active duty employment or service that may yet be tied to potential federal service in the United States National Guard for which federal recognition *is* required; nor are the injunctions clearly limited to providing homosexuals with equal

access to state active duty positions that *do not require* federal recognition. As such, in actual practice the trial court's judgment and injunctions *could* be read as creating a potential conflict between enforcement of state law and the federal Policy, at least in those instances in which there may be an overlap between state active duty service and federal service requiring federal recognition. Unless the trial court's judgment is clarified, defendants could be put in the untenable position of having to allow individuals to obtain state active duty positions for which federal recognition is required even though they may have lost or be ineligible for federal recognition because of the Policy.

To resolve this potential conflict, we conclude the trial court must clarify its judgment with language clearly and unambiguously limiting its scope to employment in state active duty positions "that do not require federal recognition." If such limiting language is added to the operative provisions of the trial court's judgment, including the declaration of unconstitutionality and each of the three subsequent injunctive paragraphs, the scope of the judgment would clearly be restricted to purely state action, conduct and activities not in danger of preemption by superceding federal law.[15] We therefore remand this cause to the trial court for it to modify its judgment, including each of the operative paragraphs thereof, so as to clarify that it is limited to state active duty employment *that does not require federal recognition*.

ATTORNEY FEES[*]

Finally, in plaintiff's separate appeal in No. A085180, he contends the trial court erred in denying his request for attorney fees under section 1021.5. Conceding that the trial court's ruling must be reviewed for abuse of discretion, he nevertheless urges that the ruling must be overturned because the trial court failed to apply the applicable standards for an award of attorney fees under the private attorney general theory codified

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[15] We note that the defendants have expressly conceded that if such a limitation were to be included in the trial court's judgment and injunctive relief orders, "preemption would not apply."

[*] See footnote, *ante*, page 1.

by section 1021.5. We disagree with plaintiff, and therefore affirm the trial court's denial of plaintiff's motion for an award of attorney fees.

Section 1021.5 provides in pertinent part as follows: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

In describing the purposes of section 1021.5, our Supreme Court has stated: "[T]he Legislature adopted section 1021.5 as a codification of the "private attorney general" attorney fee doctrine that had been developed in numerous prior judicial decisions. [T]he fundamental objective of the private attorney general doctrine of attorney fees is ' "to encourage suits effectuating a strong [public] policy by awarding substantial attorney's fees . . . to those who successfully bring such suits and thereby bring about benefits to a broad class of citizens." ' [Citations.] The doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible. [Citations.]" (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933.) The Supreme Court went on to summarize the "governing standard" for an award of attorney fees in terms of the following "statutory criteria": (1) whether the plaintiff's action has resulted in the enforcement or vindication of "an important right affecting the public interest"; (2) whether the plaintiff's action has conferred "a significant benefit, whether pecuniary or nonpecuniary . . . on the general public or a large class of persons"; (3) whether "the necessity and financial burden of private

enforcement" make the award "appropriate"; and (4) in cases where the plaintiff's action has resulted in some monetary recovery, whether or not attorney fees should in the interest of justice be paid out of that recovery. (*Id.* at pp. 934-935.)

The decision whether these factors warrant a fee-shifting award is directed to the sound discretion of the trial court, and will not be overturned on appeal absent a showing of abuse of that discretion. (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355; *Satrap v. Pacific Gas & Electric Co.* (1996) 42 Cal.App.4th 72, 77; *Feminist Women's Health Center v. Blythe* (1995) 32 Cal.App.4th 1641, 1666.) "The trial court has discretion to determine whether an award of section 1021.5 attorney fees is appropriate. [Citation.] A reversal of the trial court's determination will lie only if the resultant injury ' " 'is sufficiently grave to amount to a manifest miscarriage of justice,' " ' and ' "no reasonable basis for the action is shown." ' [Citation.]" (*Weissman v. Los Angeles County Employees Retirement Assn.* (1989) 211 Cal.App.3d 40, 46-47; accord, *Angelheart v. City of Burbank* (1991) 232 Cal.App.3d 460, 467.) " 'The pertinent question is whether the grounds given by the court for its [order] . . . are consistent with the substantive law of section 1021.5 and, if so, whether their application to the facts of this case is within the range of discretion conferred upon the trial courts under section 1021.5, read in light of the purposes and policy of the statute.' [Citation.]" (*Feminist Women's Health Center v. Blythe, supra,* 32 Cal.App.4th at pp. 1666-1667, bracketed insertion added.) At the very least, the language of section 1021.5 clearly presumes "that there be some selectivity, on a qualitative basis, in the award of attorney fees." (*Woodland Hills Residents Assn., Inc. v. City Council, supra,* 23 Cal.3d at p. 935.)

The burden is on the party seeking attorney fees under section 1021.5 to prove entitlement thereto. A failure to prove that *each* of the prerequisites has been met in a particular case will properly result in a denial of attorney fees under the private attorney general statute. Accordingly, if a court determines that a plaintiff has failed to meet even one of the statutory prerequisites for attorney fees, its inquiry ends there. (*Satrap v. Pacific Gas & Electric Co., supra,* 42 Cal.App.4th at pp. 80-81 ["In a case . . . where the

court finds that one of the statutory criteria is *not* met, it is unnecessary to make findings concerning the remaining criteria"]; *Angelheart v. City of Burbank, supra,* 232 Cal.App.3d at p. 470 [where evidence did not support "the existence of one of the necessary statutory elements under section 1021.5, there is no basis for an award of fees, and reversal is warranted" on grounds of abuse of discretion by trial court in awarding attorney fees].)

In this case, neither plaintiff nor defendants asked the trial court for a statement of decision explaining the grounds for its denial of plaintiff's motion for attorney fees under section 1021.5, and the trial court never entered one. Where the parties fail to request a statement of decision, all intendments favor the ruling below. (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 792; *Walling v. Kimball* (1941) 17 Cal.2d 364, 373.) In such circumstances, the appellate court must assume that the trial court made whatever findings are necessary to sustain the judgment. (*Michael U. v. Jamie B., supra*, 39 Cal.3d at pp. 792-793; *Homestead Supplies, Inc. v. Executive Life Ins. Co.* (1978) 81 Cal.App.3d 978, 984.) Thus, as a result of plaintiff's failure to request a statement of decision, we assume the trial court made the findings necessary to sustain its order denying attorney fees, and review the record to determine if it supports a determination that plaintiff failed to satisfy at least one of the statutory prerequisites for a grant of fees under section 1021.5.

In its written order of October 21, 1998, the trial court simply denied plaintiff's motion for attorney fees and granted the alternative motion for costs in the amount of $41,219, without explanation.[16] However, some indication of the trial court's possible reasoning may be gleaned from the record of the October 2, 1998, hearing on plaintiff's motion. At the outset of that hearing, the trial court stated that it considered the issue of

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16 In his opening brief in appeal No. A085180, plaintiff states: "The amount of $41,219 awarded in the order actually exceeded the taxable costs sought in Lt. Holmes's alternative motion, equaling the total out-of-pocket costs Lt. Holmes incurred in litigating the action."

an award of attorney fees to plaintiff "a very close question," and it had "some . . . problems" with plaintiff's request. The trial court specifically cited the unusually large amount of plaintiff's request and the "relatively narrow band of individuals" actually benefited or even affected by its decision. Our review of the record confirms that there was substantial evidence to support the trial court's expressed doubts as to whether the judgment conferred a significant benefit on a sufficiently large class of persons to justify an award of attorney fees under section 1021.5.[17]

Contrary to plaintiff's position, it is not sufficient for an award of attorney fees that the judgment vindicates the constitutional rights of a segment of the population. The fact a constitutional right is involved merely establishes the first of the three prerequisites for an award, i.e., the fact that the judgment vindicated a relatively important right or public policy. Only if it is also shown that the benefits flowing from the judgment will be widely enjoyed by the public, and that the necessity for private enforcement has placed

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[17] In pertinent part, the trial court stated: "Let me just start off by telling you what I am thinking here. Under normal circumstances I wouldn't balk at all at awarding attorneys fees if I thought—and I would simply say, 'Take an appeal from that too. Let's let the Court of Appeal decide everything at once.'

"Part of the problem that I have here is . . . it's complicated for me in that I think it's a very close question. . . . [¶] . . .

"But even apart from that then, I have some other problems. And that is the amount that you are asking for, which if you will pardon me, without again denigrating the efforts that you put into this case, looking at it from the standpoint of where I'm sitting, this case does not appear to me to be particularly complicated.

"It may be complicated from the standpoint of the concept, but from the standpoint of resources, hard for me to justify 1500 hours in this case by four lawyers. . . . [¶] . . .

"And it seems to me that it was a relatively narrow ruling, all told. And I realize that this Court finds that there is a class. . . . *But ultimately I am not convinced, quite frankly, that there is a large group of individuals out there that are actually affected. There may be a significant group of people that are theoretically affected.* For whom it is that there is a significant benefit here down the line.

"But in terms of actual positions down the line, we are probably not talking about a lot of times where this might be an issue. So ultimately I think we are talking about a relatively narrow band of individuals, if you will.

upon the plaintiff a burden out of proportion to his or her individual stake, will an award be justified. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 46, fn. 18.) "The determination that the public policy vindicated is one of constitutional stature will not . . . be in itself sufficient to support an award of fees . . . ." (*Ibid.*; see also *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 319, fn. 7 ["Of course, not all lawsuits enforcing constitutional guarantees will warrant an award of fees"]; *Woodland Hills Residents Assn., Inc. v. City Council, supra,* 23 Cal.3d at p. 939 ["Both the statutory language ('*significant* benefit') and prior case law . . . indicate that the Legislature did not intend to authorize an award of attorney fees in every case involving a statutory violation"]; *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 635 ["the Legislature did not intend to authorize an award of fees under section 1021.5 in every lawsuit enforcing a constitutional or statutory right"]; *Family Planning Specialists Medical Group, Inc. v. Powers* (1995) 39 Cal.App.4th 1561, 1570 ["the Legislature did not intend section 1021.5 to authorize an attorney fees award in every case involving a violation of an important statutory or constitutional right"].)[18]

"So all things considered, considering the fact of the judgment, . . . I feel there is probably significant, there are significant questions." (Italics added.)

[18] We do not agree with statements in cases cited by plaintiff to the extent they suggest that the general public benefit element of section 1021.5 is satisfied in all cases where some constitutional right is vindicated. (*City of Fresno v. Press Communications, Inc.* (1994) 31 Cal.App.4th 32, 44; *Best v. California Apprenticeship Council* (1987) 193 Cal.App.3d 1448, 1462.) That line of reasoning has been specifically rejected in this District. (*Flannery v. California Highway Patrol, supra,* 61 Cal.App.4th at p. 635; *Family Planning Specialists Medical Group, Inc. v. Powers, supra,* 39 Cal.App.4th at p. 1570.)

The case of *Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, a decision from this Division cited by plaintiff, is not on point. In *Sokolow,* unlike here, the trial court had issued a detailed statement of decision, which explicitly denied the plaintiffs' motion for attorney fees under section 1021.5 based on the trial court's determination that the plaintiffs "were not the prevailing party" in the underlying lawsuit. This Court's decision reversed the denial of attorney fees on the sole grounds the plaintiffs "were in fact the prevailing parties for purposes of attorney fees." (*Id.* at pp. 242-243, 246-247.) *Sokolow* is clearly distinguishable from the instant case, in which the trial court did not

The only group of persons conceivably benefited by the trial court's judgment consists of a hypothetical class of homosexual individuals who may be discharged from federal active duty or otherwise lose federal recognition solely on the basis of the Policy and their sexual orientation, and who qualify in all other respects for purely state active duty or service *not requiring federal recognition*. The record shows that plaintiff is the *first and only* individual in the California National Guard ever to have lost his federal recognition under the Policy. In certifying the class in this case, the trial court estimated the number of persons potentially benefited by its ruling as "at least 200" homosexuals in the California National Guard. Moreover, this relatively small number must be still further diminished by the consideration that an indeterminate but significant number of state active duty positions *require federal recognition*. As even plaintiff concedes, neither he nor anyone else ineligible for federal recognition because of the Policy could qualify for such a state active duty position. At present, there are only 28 officers serving in the California National Guard in state active duty positions that do *not* require federal recognition. Clearly, the number of persons actually affected by the trial court's judgment is not large.

Because plaintiff bore the burden of establishing all the necessary elements for a grant of attorney fees under the statute, his failure to prove that a single prerequisite had been met is fatal to his request. Based on the record in this case, we conclude the trial court did not abuse its discretion in denying plaintiff's motion for attorney fees under section 1021.5, on the ground the judgment did not confer a significant benefit on a sufficiently large class of persons.

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issue any statement of decision in connection with its denial of plaintiff's motion for attorney fees; there is no dispute that plaintiff was the prevailing party below; and the appeal turns on the quite different question of whether or not the trial court's judgment conferred a significant benefit on a sufficiently large class of persons.

DISPOSITION

The cause is remanded to the trial court for modification of the judgment, including the injunctions contained therein, so as clearly and expressly to limit their scope to protecting the rights of homosexuals to state active duty employment in the California National Guard not requiring federal recognition.

In all other respects, both the judgment and the order denying an award of attorney fees to plaintiff under section 1021.5 are affirmed. Each side shall bear its own costs on appeal.

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McGuiness, P.J.

We concur:

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Corrigan, J.

_____
Parrilli, J.

Trial Court:	San Francisco County Superior Court
Trial Judge:	Hon. David A. Garcia

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A083451, *Holmes v. California National Guard*
A085180, *Holmes v. California National Guard*